IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

FIRST APPEAL NO.1335 OF 2005.

Shri Vinod Durlabhdas Soni : Appellant.

versus

Shri Vijay Durlabhdas Soni : Respondent.

Mr.Nehar Ghag with Mr.Ashish Naik for the appellant.

Mr.R.C.Kaushik for the respondent.

CORAM : J.H.BHATIA,J.

DATED : 3rd August 2005.

P.C.

1. The appeal is on board for Admission. By consent it is taken up for final hearing. Heard Mr.Ghat the learned counsel for the appellant and Mr.Kaushik for the respondent at the stage of admission itself. Therefore, by consent, R&P is waived.

2. Stated, in brief, the plaintiff/appellant filed a suit in the Small Causes Court bearing S.C.Suit No.1685/2003 for order of injunction restraining the defendant No.1/respondent from entering into the suit premises being Flat No.B-203, Panchavati Apartments Co-op. Housing Society Ltd. According to the appellant he had purchased the said flat. Earlier his parents and brothers were living in the rental premises which were surrendered by his father unconditionally. Thereafter on request of his father he allowed his father as well as the defendants to reside with him in the suit flat as gratituous licensees without payment of rent. After his marriage defendant No.1 was allowed to continue to stay in the suit premises along with his wife. The plaintiff requested defendant No.1 to vacate the premises. But he refused. Therefore suit for injunction simplicitor was filed. Later on the suit was transferred to the City Civil Court as the Small Causes Court did not have jurisdiction to entertain such a suit. Parties had already filed their written statement, issues were framed and the evidence was also recorded before the

Small Causes Court. Learned counsel for both the parties agreed before the City Civil Court that the matter may proceed with the Issues and evidence already recorded. After hearing the arguments, the trial Court dismissed the suit holding that the suit for injunction simplicitor was not tenable and the plaintiff should have filed a suit for possession.

3. Being aggrieved by the said judgment and dismissal of the suit, the plaintiff has preferred the present appeal.

4. Mr.Ghag, the learned counsel for the appellant/plaintiff vehemently contended that the plaintiff is in actual occupation and possession of the suit premises and he had only allowed the defendants to live with him as gratituous licensees and, therefore, it was not necessary to file a suit for possession. In support of his contention, he relied upon a judgment of the learned Single Judge of this Court reported in **Conrad Dias v. Joseph Dias 1995(3) Bom.C.R. 218**. However, the facts of that case are totally different from the facts of the present case. In that case the father and son were admittedly

living jointly in the suit premises and in such circumstances it was held that it was not necessary for the plaintiff to file a suit for possession. In the present case, even though the plaintiff claims to be an exclusive owner of the suit flat, it appears that he himself has not been residing in the said flat. In the title of the plaint as well as that of the appeal the appellant has specifically mentioned that he is residing in Flat No.C-404, Panchavati Apartments Co-op. Housing Society Ltd. while the defendants are residing in the suit flat bearing B-203 in the same society. From this, it is clear that the plaintiff is not actually residing in the suit flat and even if it is believed that the defendants are gratituous licensees of the plaintiff, still the possession of the defendants cannot be disputed. In such circumstances, the suit for injunction simplicitor will not be tenable. The plaintiff was required to file suit for possession. The learned trial Court was perfectly justified in dismissing the suit.

5. In view of the above facts and circumstances, I find no merits in this appeal. In the result, the appeal stands dismissed.

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